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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW JERSEY CHAMBER OF COMMERCE, et al.,
Petitioners,

v.

ROBERT E. HUGHEY, et al.,
Respondents.

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, et al.,
Petitioners,

v.

WILLIAM VAN NOTE, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the container labeling provisions of the New Jersey Worker and Community Right To Know Act, which are intended to furnish chemical identity information to firefighters, police officers, other public safety officials and members of the community at large, are expressly preempted by the Occupational Safety and Health Act of 1970 and the container labeling provisions of OSHA's Hazard Communication Standard, which are solely designed to protect workers from chemical hazards?

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No. 1845
No. 1868

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, defendants and defendants-intervenors in the Court of Appeals, respectfully request that this Court deny the petitions for writ of certiorari

seeking review of the opinion of the United States Court of Appeals for the Third Circuit. That opinion is reported at 868 F.2d 621 (3d Cir. 1989).

STATEMENT OF THE CASE

In 1983, the New Jersey Legislature enacted the Worker and Community Right To Know Act, N.J.S.A. 34:5A-1 to 31 (Right To Know Act). A central feature of this Act is the labeling requirements found in N.J.S.A. 34:5A-14. Section 14 requires the labeling of containers that contain hazardous substances (Section 14(a)) and the labeling of every other container covered by the Act (Section 14(b)). The latter provision is generally referred to as the "universal labeling provision" of the Right To Know Act.

The Occupational Safety and Health Administration (OSHA) has mandated in the Hazard Communication Standard (Standard), 29 C.F.R. sec. 1910.1200 (1988), that employers label containers of hazardous chemicals with

the identity of the hazardous chemicals and appropriate hazard warnings. 29 C.F.R. 1910.1200(f). These requirements have been established pursuant to OSHA's authority under the Occupational Health and Safety Act of 1970, 29 U.S.C. secs. 651-678, to promulgate standards governing employee health and safety.

In New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) (Hughey I), the court of appeals concluded that the part of the Right To Know Act requiring the labeling of workplace hazards in the manufacturing sector was expressly preempted by the OSH Act and the federal Standard. Id. at 595 (101a).[1] The Third Circuit also determined that, on the issue of implied preemption, there were material factual disputes regarding the confusion allegedly

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1. Throughout this brief,, citations to the Appendix, e.g. "101a", will be to the Appendix filed by the petitioners in No. 88-1845.

engendered by the existence of the New Jersey and OSHA labeling schemes. Id. at 596. (102a). Accordingly, the case was remanded to the district court. After four days of testimony, the district court found that the New Jersey Act was not an obstacle to the accomplishment of the federal standard and, consequently, held that the Act was not impliedly preempted by the OSH Act or OSHA's Standard. (121a, 147a).

The petitioners renewed their express preemption challenge to the Act's labeling provisions on appeal to the Third Circuit. In New Jersey State Chamber of Commerce v. Hughey, 868 F.2d 621, 627 (3d Cir. 1989) (Hughey II) (15a-16a), the court of appeals concluded that Hughey I had construed these labeling provisions as intended to furnish information about the identity of chemical substances to firefighters, police officers, other public safety officials and members of the community at large. Since the OSHA Standard only preempted state occupational

health and safety laws, and since the New Jersey Act, as construed in Hughey I, is designed to address legitimate state concerns other than worker protection, the court of appeals in Hughey II treated the express preemption of New Jersey's labeling requirements as foreclosed by the Hughey I determination. 868 F.2d at 627. (15a-16a).[2]

REASONS FOR DENYING THE WRIT

Petitioners seek review of the Third Circuit's determination that the New Jersey Right To Know Act's labeling requirements are not expressly preempted by the OSH Act or the

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2. The court of appeals also concluded "that the district court's finding that the Right To Know Act does not stand as an obstacle to the accomplishment of the purposes of the federal standard is not clearly erroneous, and that the district court correctly concluded that Section 14 of the Right To Know Act is not impliedly preempted." Id. at 631 (23a).

federal Hazard Communication Standard.[3] However, as we will explain, the well-reasoned decisions below do not conflict with any decision of this Court or of the other Circuits. Additionally, less than two years ago, this Court denied a petition for writ of certiorari presenting similar questions arising from the Third Circuit's consideration of the Pennsylvania Worker and Community Right to Know Act, Manufacturers Ass'n of Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986), cert. den., ___ U.S. ___, 108 S.Ct. 66 (1987). Significantly, OSHA's promulgation of a revised Standard in August 1987 confirms the correctness of the court of appeals' approach to preemption. Consequently, for the reasons set forth below, the petitions for writ of certiorari should be denied.

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3. Petitioners have not sought review of the court of appeals' decision that the New Jersey Act's labeling provisions are not impliedly preempted by federal law.

I. The Court of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Of Any Other Circuit

Petitioners contend that there are two flaws in the court of appeals' analysis of express preemption: (1) the court construed the preemption provisions in the OSH Act and Hazard Communication Standard too restrictively; and (2) the court's focus on the purpose of the state labeling provisions permits a state to readily escape OSH Act preemption by merely asserting a non-occupational purpose. The petitioners' assertions reflect a misapprehension of the Third Circuit's decisions; more significantly, however, the lower court's opinion on these issues is consistent with the decisions of this Court and the only other Circuit that has considered a preemption claim in a similar context.

Prior to assessing petitioner's contentions, we will briefly describe the pertinent provisions defining the scope of OSHA preemption. The OSH Act and standards

adopted by OSHA under the Act are solely and exclusively concerned with occupational safety and health of employees in private-sector workplaces. See, e.g., 29 U.S.C. 654(a). Occupational safety and health standards adopted by OSHA apply "only to employers and their employment and places of employment," rather than to any "class of persons larger than employees." 29 C.F.R. 1910.5(d). Section 18(a) of the Act permits any state agency or court to "[assert] jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. 667(a). Under Section 18(b), when a state desires to develop or enforce "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title," the state must secure OSHA approval of a state plan. 29 U.S.C. 667(b) (emphasis added). The Hazard

Communication Standard, as revised in 1987, further delineates the scope of federal preemption:

> This occupational safety and health standard is intended to address comprehensively the issues of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject . . . Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan. [52 Fed. Reg. 31877 (592a)] [emphasis added].

With this background in mind, we will now consider petitioners' arguments. Petitioners first assert that the "relating to" language used in section 18(b) of the Act and repeated in the revised standard should be equated with the same term found in the very broad preemption clause of ERISA, which supersedes

"any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. 1144(a). The two courts of appeal that have considered this contention have had no difficulty finding it to be without merit, given the wholly different purposes of ERISA and the OSH Act. In this regard, the lower courts' holdings are consistent with the view of this Court, which has described ERISA's preemption provision as "virtually unique." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n. 26 (1983).

In Hughey I, the Third Circuit concluded that to accord section 18(b) the same far-reaching scope as the ERISA preemption clause would be inconsistent with the OSH Act's important but limited purpose of protecting worker health and safety in the workplace. 774 F.2d at 593. (94a-95a). Reaching the same conclusion in a case involving another OSHA standard, the Second Circuit observed: "The only textual affinity that section 18

holds with ERISA's preemption provision is the use of the word 'related.'" Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 56 (2d Cir. 1988). Thus, the consistent view of this Court and the courts of appeal, as the Second Circuit observed, is that the ERISA cases "must largely be confined to the ERISA regulatory scheme." Id.[4] Consequently, the court of appeals' conclusion that the OSH Act should not have a preemptive effect beyond the area of occupational health and safety is eminently correct (92a, 95a-96a); indeed, as we explain below (infra at p. 21-22), on a related appeal in the Third Circuit the Secretary of Labor took the identical position on the scope of preemption of the Hazard Communication Standard. (96a).

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4. It is also significant that the Solicitor General, in an amicus curiae brief filed at the request of this Court in Knepper, refused to adopt the view, urged by the present petitioners, that ERISA preemption cases are relevant in determining the scope of OSH Act preemption. Brief for United States As Amicus Curiae, No. 86-1102, at 14 n. 12.

Petitioners also contend that the court of appeals' inquiry into the purpose of the environmental hazards and universal labeling provisions conflicts with prior decisions of this Court. This claim is unsupportable. The lower court's consideration of whether the avowed concern of the state statute is outside the scope of federal regulation is consistent with, if not compelled by, this Court's opinion in Pacific Gas and Electric Co. v. State Energy Resources Commission, 461 U.S. 190 (1983). There, a California energy conservation and development statute established a moratorium on state certification of new nuclear power plants pending a state finding that the Nuclear Regulatory Commission had approved a method of permanent disposal of high-level nuclear waste. The Court construed the Atomic Energy Act to create a "dual regulation" of nuclear power generation: the federal government has exclusive and complete authority over safety aspects including construction and operation

of plants, while the states retain power to regulate economic aspects such as the need for additional facilities and rates. 461 U.S. at 211-212. The California provision imposing a moratorium on new construction would thus be preempted if enacted for "safety reasons," observed the Court, but not preempted if enacted for economic reasons. Id. at 213. It was therefore "necessary to determine whether there is a non-safety rationale" for the provision. Ibid. The state maintained that the statute was in fact "aimed at economic problems, not radiation hazards," and the court of appeals so found. Ibid.

In Pacific Gas and Electric Co., this Court reiterated the strong presumption against preemption of state laws enacted in the exercise of the police power. Id. at 206; see Hillsborough County v. Automated Medical Laboratories, supra, 471 U.S. 707, 715 (1985). It concluded that although the statute's purpose was "subject to varying interpretation," id. at 215, there was a

sufficient basis to "accept California's avowed economic purpose as the rationale" for the provision. Id. at 216. The Court noted that its general practice is to "place considerable confidence in the interpretations of state law reached by the federal courts of appeals." Id. at 214 (citations omitted).

Finally, the Court rejected the utility companies' arguments based on Perez v. Campbell, 402 U.S. 637 (1971), which is also heavily relied on by the present petitioners. Perez found preempted by the Bankruptcy Code an Arizona statute requiring the license suspension of uninsured motorists with unsatisfied judgments until they were able to demonstrate financial responsibility, even after the debts had been discharged in bankruptcy. Noting the state's claim that the statute's purpose was to deter irresponsible driving rather than to aid creditors, the Perez Court rejected the proposition that "state law may frustrate the operation of

federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." 402 U.S. at 651-652. The Court in Pacific Gas found this reasoning in Perez inapposite to preemption analysis of the California nuclear energy provision, stating: "Only if there were an actual conflict between [the California provision] and the Atomic Energy Act, such that adherence to both were impossible or the operation of state law frustrated accomplishment of the federal objective, would Perez be apposite." 461 U.S. at 216 n. 28 (emphasis added).

The analysis and holding in Pacific Gas demonstrate the correctness of the preemption analysis of the New Jersey labeling provisions by the court of appeals. Initially, the underlying theme of the Third Circuit's opinion is the strong presumption articulated in Pacific Gas against the preemption of state laws designed to protect the public health, safety and welfare (96a-97a). As to the

universal labeling provision, section 14(b) of the Right To Know Act, the Third Circuit concluded in Hughey I and II that this provision is designed for a single purpose unrelated to any occupational or worker protection concern within OSHA's jurisdiction: to "furnish information to firefighters, police officers, and members of the community at large." (14a-16a).[5] This interpretation of state law by the court of appeals is entitled to "considerable" deference. Pacific Gas, 461 U.S. at 214.[6] Moreover, applying the clearly erroneous test to the factual findings of the district court on the implied preemption issue, (20a) (citing Hillsborough

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5. The district court, after hearing testimony on the purposes of the New Jersey Act, found that "[u]niversal labeling has primary purposes other than worker protection." (148a).

6. Petitioners' efforts in the case at bar to upset this interpretation by the lower court are no more persuasive than the similar arguments rejected by this Court in Pacific Gas. 461 U.S. at 214-216.

County, supra, 471 U.S. at 720-721), the court of appeals agreed that universal and environmental hazards labeling "does not stand as an obstacle to the accomplishment of the purposes of the federal standard," (23a) and petitioners have not contested that determination in this Court. Thus, in the absence of any conflict between state and federal law, or any frustration of the objectives of the Standard, the passage in Perez v. Campbell relied upon by petitioners is wholly inapposite to the present case.

Consequently, consistent with this Court's preemption decisions, the court of appeals correctly determined that New Jersey's avowed purpose in the Right To Know Act's labeling provisions of furnishing chemical identity information to firefighters, police officers and the members of the community at large places these provisions of the Act outside the preempted area of worker health and safety.

2. The Court of Appeals' Preemption Analysis Is Consistent With The OSHA Standard

The court of appeals below, both in its two Hughey opinions and in its intervening opinion in Manufacturers Association of Tri-County v. Knepper, 801 F.2d 130 (3rd Cir. 1986), cert. denied, ___ U.S. ___, 108 S.Ct. 66 (1987), analyzed state labeling provisions to determine whether they were directed to the promotion of occupational health and safety, and were thereby expressly preempted, or whether they had a non-worker health and safety purpose and, as a result, were outside the preemptive scope of OSHA's Standard.

Petitioners argue that this approach to preemption effectively negates the scheme in section 18 under which states wishing to regulate with respect to issues addressed by an OSHA standard must secure OSHA approval of a state plan. In fact, however, when OSHA revised the Hazard Communication Standard in 1987, the agency specifically adopted the test formulated in Hughey I and Knepper. In the

preamble to the revised standard, OSHA refers to these and other recent preemption decisions of the courts of appeals and then concludes:

> The revised sec. 1910.1200(a)(2) not only defines hazard communication as an "issue" under the terms of the Act, but also enumerates the generic areas addressed by the standard for purposes of establishing the parameters of preemption. Thus any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan. [52 Fed. Reg. 31861 (537a-538a); emphasis added.]

Conversely, a state provision concerning "labeling of chemicals" whose "primary purpose" is not that of "assuring worker health and safety" is not preempted, under OSHA's most recent pronouncement. Such interpretive comments by a federal agency

accompanying its adoption of regulations should be given substantial weight in discerning the agency's intent. Cf. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 714 (1985).

This interpretation by OSHA of its revised Standard displaces an earlier depiction of its position in an amicus curiae brief submitted by the Solicitor General in Knepper. That brief, cited by both petitioners here (Petition of New Jersey Chamber of Commerce at 20-22; Petition of Fragrance Materials Association at 18), discusses the preemptive scope of the original Standard. According to OSHA, under that Standard state right to know provisions were preempted "which have, as their primary purpose or effect, the regulation of communication of hazard information to manufacturing employees." Brief for United States As Amicus Curiae, No. 86-1102 at 9 (emphasis added); see also id. at 13. As noted above, the "effect" component of the

preemption calculus has been deleted, and in the revised standard OSHA has adopted the "primary purpose" test applied by the Third Circuit. Petitioners' reliance on the Solicitor General's discussion of language in the original Standard is thus misplaced in light of OSHA's unequivocal statements in the revised Standard.[7]

Indeed, OSHA's position in the revised Hazard Communication Standard on preemption of state right to know provisions that address public, rather than occupational, health and safety concerns, was adumbrated in a brief filed by the Secretary of Labor in United Steelworkers of America v. Auchter, 763 F.2d 728, 735 (3d Cir. 1985). That brief states:

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7. As explained above, even when the effect of the New Jersey labeling provisions on the OSHA scheme is considered, the factual findings of the lower courts, which are not challenged by petitioners, establish that (1) there is no conflict between the state and federal law, and (2) New Jersey's additional labeling requirements do not frustrate the accomplishment of the federal objectives.

> The Secretary's mandate under the OSH Act extends only "to assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 561(b). Public health and safety, including general environmental problems originating in the workplace, but whose effects are outside it, are beyond his purview. The preemptive effect of an OSHA standard can be no broader than the Secretary's mandate. There is accordingly no controversy between the Secretary and those states that argue "[i]nsofar as activities involve the health or safety of the general public, there is not Federal regulatory [including preemptive] authority under OSHA . . ." [Brief for Secretary of Labor at 88-89; brackets in original and emphasis added.]

Petitioners conveniently overlook the Third Circuit's reliance, in determining the scope of federal preemption, on the agency's interpretation of the OSHA Standard. 774 F.2d at 593 (96a).

Finally, the assertion by petitioners that the court of appeals' decisions allow New Jersey to "second guess" the federal agency's labeling determinations, and thereby undermine OSHA, is without merit. There is simply no

indication that OSHA intended to preclude the chemical identity labeling required by New Jersey's Right To Know Act. Rather, OSHA's repeated statements make it clear that the Hazard Communication Standard adopts a performance-oriented approach that allows employers to take advantage of a wide variety of compliance approaches, and to utilize diverse labeling systems, so long as the standard's minimal information requirements are fulfilled. See, e.g., 47 Fed. Reg. 12111 (Notice of Proposed Rulemaking) (212a); 48 Fed. Reg. 53301 (306a-308a). Indeed, OSHA explicitly rejected the idea of a standardized or specific labeling format as suggested by several commentators, (307a-308a), and the agency's failure to require the chemical name on a label is clearly not the same as an affirmative decision to prohibit this information. In light of these statements of agency intent throughout the recent history of the Standard, it is entirely disingenuous to simply assert, as do petitioners, that OSHA's

labeling requirements somehow imply a determination that the information required by Section 14 in the New Jersey Right To Know Act is prohibited.

Furthermore, nothing in the 1987 revised Hazard Communication Standard expresses or implies an intent to restrict label content to the OSHA-required indentifier and hazard warning. Rather, OSHA expressly recognizes in the preamble to the revised Standard that "employers can choose to provide additional statements" on labels and utilize any format "as long as the label includes the information regarding the chemical hazards required by the standard." 52 Fed. Reg. 31864. (551a). Therefore, the court of appeals properly concluded that petitioners' assumption that the OSHA Standard dictated a "fixed rather than flexible" scheme was "unfounded" (21a-22a).

In sum, the court of appeals' express preemption analysis has been guided by, and is entirely consistent with, the position

articulated by the Secretary of Labor and adopted by OSHA. Petitioners' assertion that the court of appeals' decision would impair or impede OSHA's ability to regulate employee health and safety concerns fails to withstand scrutiny.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari in No. 88-1845 and No. 1868 should be denied.

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